UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MATTHEW SCHAEFFER,	*	Case No. 23-CV-01921(FB)
	*	
Plaintiff,	*	Brooklyn, New York
	*	August 1, 2023
v.	*	
	*	
SIGNATURE BANK, et al.,	*	
	*	
Defendants.	*	
	*	

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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE JAMES R. CHO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Movants Wayne County ERS and Mississippi PERS:	JEREMY A. LIEBERMAN, ESQ. EMMA GILMORE, ESQ. Pomerantz, LLP 600 Third Avenue New York, NY 10016
For the Movant Sjunde AP-Fonden:	SHARAN NIRMUL, ESQ. NAUMON A. AMJED, ESQ. Kessler Topaz Meltzer & Check, LLP 280 King of Prussia Road Radnor, PA 19087
	JOHN RIZIO-HAMILTON, ESQ. Bernstein Litowitz Berger & Grossmann, LLP 1251 Avenue of the Americas Suite 44th Floor New York, NY 10020

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES (Cont'd):

For the Receiver FDIC:	RYAN KANE, ESQ. Wollmuth Maher & Deutsch, LLP 500 Fifth Avenue New York, NY 10110

(Proceedings commenced 9:10 a.m.)

THE CLERK: Good morning. Civil cause hearing for a motion hearing in Schaeffer v. Signature Bank, et al, 23-CV-1921.

State your appearance for the record starting with the plaintiff.

MR. LIEBERMAN: Good morning, Your Honor. Jeremy Lieberman from Pomerantz, LLP on behalf of Plaintiff Singh, Wayne County Employees' Retirement System, and Mississippi PERS. With me is my partner, Emma Gilmore. And I'll be arguing matters relating to the FDIC's motion to dismiss and she'll be arguing lead plaintiff motions.

MS. GILMORE: Good morning, Your Honor.

THE COURT: Okay. Understood. Thank you.

MR. NIRMUL: Good morning, Your Honor. Sharan Nirmul of Kessler Topaz Meltzer & Check. I'm joined by my partner, Naumon Amjed. Mr. Amjed has a pending motion for pro hac vice. With your permission, he's going to handle the argument today.

THE COURT: That's fine. We'll be granting that motion.

MR. AMJED: Thank you, Your Honor.

MR. NIRMUL: And I'm also joined by my colleague, John Rizio-Hamilton from the law firm Bernstein Litowitz.

MR. RIZIO-HAMILTON: Good morning, Your Honor.

THE COURT: Okay. Good morning.

MR. KANE: Good morning, Your Honor. Ryan Kane from Wollmuth Maher & Deutsch, LLP. I represent the FDIC as receiver for Signature Bank. I'd like to thank Your Honor for inviting me to this conference.

THE COURT: All right. And thank you for being here even though you're technically not a party anymore, so I appreciate your being here.

The parties should assume I am familiar with all the pleadings that have been filed in this case so far, so you can assume I've reviewed the briefs as well.

I wanted this conference because I received the FDIC's, obviously, their letter, and the parties', or the movants' responses to that letter. So there are essentially two questions I have for all the parties today.

One, any new updates since any of the pleadings were filed that the parties want to update the Court on?

And two, notwithstanding the fact that the FDIC is no longer a party to this case, the issues raised in their letter, and I've seen the responses, but does that preclude this court from ruling on the pending motions to appoint lead plaintiff and lead counsel. I think that was the main concern that I had at this time.

I think I can assume what the parties are going to say, but I just want to make sure we're all on the same page

in that regard.

All right. So let me start with you, Mr. Kane. I'll put you on the seat first, the hot seat first.

Do you have a position as to whether the Court at this time can rule on the pending motions to appoint counsel and lead plaintiff?

MR. KANE: Your Honor, would you like me to stand?

THE COURT: No, you may remain seated.

MR. KANE: Thank you. The microphone would have been awkward standing.

THE COURT: That's fine.

MR. KANE: Yes, Your Honor.

The FDIC's position in the letter that I submitted to Judge Block is that this court currently does not have subject matter jurisdiction for two reasons. I'll just briefly state them because I know you've read the letter.

One is that the plaintiffs have not exhausted the claims process, the administrative claims process, required by the FDIC. Until that process is exhausted by each plaintiff, no court has jurisdiction.

Secondly, even after the claims process is exhausted, only two courts, only two federal courts, would have jurisdiction. That would be the district courts for the District of Columbia and the district court for where the FDIC, I'm sorry, where the Signature Bank's headquarters was,

and that would be Manhattan and, therefore, the Southern District of New York.

The issue raised in plaintiff's response letters is that that issue is moot. The FDIC's position is that issue is not moot because the claims that are required to be submitted to the FDIC receiver process are not limited to claims against Signature Bank.

The scope of the claims that need to be submitted to the FDIC under its Section 821(d)(13)(D), which is cited in my letter, is not limited to claims just against Signature Bank. It requires all claims under two categories.

And the first category is any claim or action for payment from or any action seeking determination of rights with respect to the assets of any depository institution for which the FDIC is receiver.

And secondly, any claim relating to act or omission of such institution with the FDIC as receiver.

Neither of those provisions are limited to a claim directly against Signature Bank, so the dismissal of Signature Bank does not moot that issue. And the current claims against the individual defendants would fall within both of those buckets.

Taking the first one, for example, any claim or action for payment from or seeking determination of rights with respect to the assets of the receivership, it is

certainly possible that to the extent the plaintiffs prevail in their claims against the individual defendants, which are directors and officers of Signature Bank, it could implicate the directors' and officers' insurance liability which is an asset of FDIC. And there's case law confirming that.

I can give the Court one cite. That's *National Union Fire Insurance Company vs City Savings Bank*, 28 F.3d. 376, pin cite 38485. That's a Third Circuit case, Your Honor, from 1994. And it holds insurance policies, which a bank has purchased under which it is an insured, fall neatly within FIRREA'S definition of assets for purposes of 1821(d)(13)(D), which is the provision I just explained to Your Honor.

And secondly, under the second prong, which includes any claim relating to any act or omission of such institution or the FDIC receiver, that likewise is not limited to claims directly against Signature Bank.

As we read, as FDIC as receiver reads, the Schaeffer complaint certainly implicates concerning Signature Bank before it entered receivership.

So with respect to subject matter jurisdiction, which as Your Honor surely knows is a threshold issue for this court to make any determinations, that is an issue that is -- that is still an issue for this court even though Signature Bank has been dismissed.

And the second issue in my letter, Your Honor, was a

real party in interest issue. And that is are these claims that plaintiffs are attempting to assert, do they belong to the stockholders or do they now belong to the receivership?

And FDIC's position is that they belong to the receivership. And the relevant provision for that, Your Honor, which is also cited in my letter to Judge Block, is 12 U.S.C. 1821(d)(2)(A)(I), and that language states, and I'll quote the relevant part, "The corporation which is the FDIC as conservator or receiver, and by operation of law succeeds to" -- and this is Roman numeral I -- "all rights, title, powers and privileges of the insured depository institution and of any stockholder, member, account holder, depositor, officer, director of such institution with respect to the institution assets of the institution."

Again, that's not limited to claims against Signature Bank. It applies to claims by stockholders or shareholders, which Schaeffer and the plaintiffs purport to be, and it is broad. It relates to any claims with respect to institutions and assets of institution, which is Signature Bank.

And our reading of the Schaeffer complaint is that clearly relates to the assets of Signature Bank and Signature Bank itself.

I think the most relevant case is the one I cited in my letter, Your Honor. That's *Zucker vs. Rodriguez*, which is

a First Circuit case from 2019, that's 19 F.3d. 649660. I think it's a very important case and it deals directly with this issue as to who owns claims brought by stockholders and interprets 12 U.S.C. 821(d)(2)(A)(I), and holds that the plain language of that statute means that FDIC as receiver steps into and becomes the owner and real party of interest with respect to claims such as those brought in this action.

So, in sum, Your Honor, we received plaintiffs' letters, which indicate that our issues are moot, that are presented in my letter and FDIC disagrees with that position.

And to circle back to your question, Your Honor, the FDIC as receiver's position is that the issues in the letter I sent to Judge Block do create an issue that this court does not have subject matter jurisdiction at this time.

THE COURT: You don't represent the individual defendants though.

MR. RYAN: No, Your Honor. I do not represent the individual defendants. I've had no contact with them.

THE COURT: Do you have any sense as to who might represent them at some point in time if this case goes forward?

MR. RYAN: I do not have that information.

THE COURT: Okay.

MR. RYAN: The FDIC as receiver may have that information, I just do not. I'm not privy to it.

THE COURT: Understood.

Are you arguing, well, if you can say this or not, but, would there be any conflict for your firm to represent the individuals as well as the bank?

MR. RYAN: I don't know if there would be a conflict, but there's no plan for my firm to represent individual defendants. And I don't think we would. I'm almost certain we would not take on that representation.

THE COURT: Okay. What I did notice from your letter was you don't cite any Second Circuit cases in terms of whether the claims of the individual defendants are now those claims of the FDIC as receiver, right?

Is it your view that that issue is at least unsettled in the Second Circuit or has that issue been decided?

MR. RYAN: I think we can submit -- I don't know if there's a Second Circuit Court of Appeals cases, but our case is within the Southern District, which I'm happy to supplement if Your Honor would be interested in those, which deal generally with the 12 U.S.C. 1821(d)(2)(A)(I). I do not think they are as specifically on point as *Zucker* is though.

There's not a case in the Second Circuit to my knowledge that is following *Zucker*, which is a 2019 case.

THE COURT: Right. I think that the --

MR. RYAN: There's not too many cases that

specifically deal with this issue.

THE COURT: Right. No. I understand. Okay.

One argument that the movants are raising is that this issue is premature.

And I know when it comes to subject matter jurisdiction it's never, it's always ripe for the Court to decide.

But their argument is that this motion, if ever filed, assuming you are a party to this case, and you're not at this time, would be premature, that their motion to appoint plaintiff lead counsel is separate and apart from that issue that you're raising.

And, look, these individual defendants haven't filed an appearance yet either.

MR. RYAN: Mm-hmm.

THE COURT: Right? I'm assuming they're been served, but I'm not sure either. So, okay, I understand.

MR. RYAN: If I can just add, Your Honor?

THE COURT: Sure.

MR. RYAN: Our plan is to file a motion to intervene in order to raise the issues in our motion to dismiss.

The FDIC is routinely permitted permission to intervene in cases like this and I'd hope there would be no opposition to it. But if there is, the FDIC will be filing a motion to intervene so that it can raise the issues that are

set forth in my letter.

Our intention obviously was to raise them in the motion to dismiss, but on the response date to the letters, Your Honor knows the plaintiffs voluntarily dismissed Signature Bank. FDIC is receiver for Signature Bank.

THE COURT: Understood. I guess they found your letter compelling.

MR. RYAN: Once in a while I guess someone finds my letter compelling.

THE COURT: Or they're trying to avoid the Court having to decide that issue as well.

MR. RYAN: I would like to think it was my letter was compelling, but it may be the latter issue, Your Honor.

THE COURT: Okay.

MR. RYAN: And that's why we're planning to move to intervene to make sure this issue, which I believe is an important issue because it affects the FDIC's, as receiver, administration of the Signature Bank receivership, and making sure everything is done according to FDIC regulations as to how claims are reviewed as part of the receivership, how they are determined, and the priority of such claims.

So that's why the FDIC is being proactive and trying to assert these issues now to Your Honor and why it plans to move to intervene as opposed to just waiting for these other issues to be resolved.

THE COURT: I understand.

And, look, not having seen the motion to intervene yet, I guess the question for you is, if the Court does rule on the pending motion to appoint counsel and lead plaintiff, how is the FDIC prejudiced in any way?

In other words, can all these arguments be raised after the Court has decided that issue, that motion?

MR. RYAN: It's a good question, Your Honor.

You know, I don't think of any -- I can't think of any great prejudice to the FDIC if the Court, you know, believes it has subject matter jurisdiction and can make that ruling while we file our motion to intervene and raise those issues.

You know, there could be costs that are incurred, which could create, you know, costs that, you know, the defendants tried to obtain from the D&O insurance for insurance fees. That's a possibility.

But, you know, I can't tell Your Honor there's going to be, you know, tremendous prejudice.

I think it's more whether the Court has -- currently has subject matter jurisdiction and has authority to make those decisions as opposed to, you know, some great prejudice to the FDIC that I can articulate right now.

THE COURT: Understood.

So thinking down the road here, and I appreciate you

answering all these questions, even though, again, you're not a party to this action at this time, if they exhaust, which I assume they're going to try to do now, once they're exhausted, would a case like this be appropriate for a federal court to decide?

MR. RYAN: There would still be -- Your Honor, that's a good question.

I don't know. I don't believe all the plaintiffs have submitted claims to date. I haven't had -- haven't looked at all the records that are up to date, because there's a lot of claims. But assuming all the plaintiffs do exhaust and then the claim is denied, so if we assume both those things happen --

THE COURT: Right.

MR. RYAN: -- and then the issue is do the plaintiffs actually own the claims, so there still would be a real party of interest.

But if we also assume, you know, that claims are exhausted, the FDIC as receiver denies them --

THE COURT: Right.

MR. RYAN: -- plaintiffs are correct that they're the real part of interest, FDIC is wrong, that they're a real party of interest, and then after all those -- we assume all that happens, the claim -- the case would have to be filed in the Southern District of New York or the District of Columbia.

Of course we still have the real party of interest issue.

FDIC's view is there is only one plaintiff and that's the FDIC, or theoretical plan.

THE COURT: Is it safe to assume that if the claims are exhausted and a determination is made to deny the claims that the FDIC would be pursuing an action like this? Do you have any sense?

MR. RYAN: Well, there's -- I can't reveal all the details, Your Honor, but --

THE COURT: I understand.

MR. RYAN: -- the FDIC, as a matter of practice when a bank fails and there's a receivership, there will be an investigation by the FDIC into potential claims that the receivership can bring against any party. That can include directors and officers, third parties. It can include anyone, which sort of implicates, you know, the issue of who actually is a real party of interest. Because FDIC, you know, during the investigation, you know, could identify claims or breaches by individual defendants in this case or any party.

THE COURT: All right. I think my lat question for you at this point, if you can answer it, your view is that this case should be, along with the companion case, should be dismissed outright, correct?

MR. RYAN: That's right, Your Honor, for the reasons

set forth in my letter.

THE COURT: Okay. And you would not entertain a stay of these two actions, would you?

MR. RYAN: I would have to consult with my client, the FDIC as receiver, as to whether they would agree to a stay. I don't know what their position would be at this point.

THE COURT: Okay.

MR. RYAN: But that's something I certainly, if that's where the Court comes out, that's something I certainly can quickly find out, the FDIC's position on, and inform the Court and the parties.

THE COURT: Okay. All right. Let me turn to the actual movants now then.

Why don't I hear from you, Ms. Gilmore, Mr. Lieberman, first then. Who wants to --

MR. LIEBERMAN: Sure.

THE COURT: Which of you wants to go first, go ahead.

MR. LIEBERMAN: Your Honor, with respect to the subject matter jurisdiction, we first believe this issue is not ripe. We currently don't have even a party arguing with respect to the subject matter jurisdiction. That would be subject to a motion to dismiss.

So right now we have currently lead plaintiff

motions which have a deadline where there's a legislative mandate to rule on those motions. And we have some non-party who's, quote/unquote, "Threatening" as it were or stating his intent to make a motion to intervene.

So there's nothing procedurally that stops the Court from ruling on the lead plaintiff motions. Once those lead plaintiff motions are ruled upon, there will be one party who can then address those motions and brief them.

We would actually suggest that an amended complaint be filed because that amended complaint will determine whether or not this is indeed a suit related to an asset of the failed depository or whether it relates to the subject matter that falls within the purview of FIRREA.

So I think the threshold issue is is we have right now PSLRA pending motions, and we have someone who might, may or may not intervene. He might -- you know, their client might decide tomorrow not to intervene. There's simply nothing pending in front of the Court.

The Court should rule on these lead plaintiff motions, make a determination, we suggest, then we think an amended complaint should be filed. That amended complaint will frame the entire analysis for the Court with respect to whether or not these claims fall within FIRREA statute.

We would submit there's nothing in the relevant case law that permits the Y powers that the FDIC is claiming in

this matter.

You have -- you have the *Bank of New York vs. First Millennium* which dealt with a direct claims by a -- against a non-bank where that holding company was accused of herding the bank's assets and those claims were deemed by the Second Circuit to fall not within the subject matter of jurisdiction of FIRREA and not within the purview of the FDIC's remit.

And so the Court, on all fours, the Second Circuit authority, saying these claims simply -- direct claims do not apply with respect -- particularly with respect to third parties, do not trigger the subject matter jurisdiction issues that FIRREA raises. So that's one.

Two, I find that the FDIC's reference to the *Rodriguez* cases is quite interesting.

First of all, that is an outlier. Most cases do make a distinction between direct and derivative claims, particularly here where we don't even have -- it's not a direct versus derivative versus the bank or receiver, we don't even have a party here. The corporation is no longer involved in the case.

And so you have direct versus derivative issue raised in *Levin vs. Miller* where that -- that really encompasses the view of most circuit courts in this nation.

And then you have the outlier where you say -- *Rodriguez* says, well, the statute doesn't make this

distinction between direct versus derivative. But *Rodriguez* makes an important admission. And it says that we are not ruling, the Court specifically says they're not determining this action is not one alleging fraud or one to enforce securities laws and so the future claims by other shareholders or banks in FDIC receivership will need to be evaluated in their own terms.

And this is the first time on record that the FDIC has come out in any case that we're aware of, Your Honor, and said that shareholder claims in a securities fraud class action, particularly against individual defendants, are subsumed by the FDIC's power. This is the first time that the FDIC has made that position in our record in all the decades in its existence.

And so those are great powers that the FDIC is asserting for the first time in this courthouse.

We think the lead plaintiff should be appointed. We think an amended complaint should be filed. And at that point the FDIC can seek to make a motion to dismiss on subject matter jurisdiction, other defendants can come in and make a motion to dismiss on any other issue, and the Court could determine that on a full record. That's simply not what we have here, Your Honor.

And so that really is -- frames in our view the arguments.

You simply don't have a case on record where the -- a court has found that a securities class action on behalf of direct plaintiffs, a class of investors, is subsumed by FIRREA.

And very importantly the case law is clear that the only subject matter jurisdiction is only subsumed when the claims could have been handled in the administrative process in the claim process.

And the FDIC said nothing in it's notice, nothing about securities fraud class actions, particularly securities fraud class actions against the individual defendants.

And so there's nothing in the notice that said if you are a class member who has a securities fraud claim you must now -- against any defendant related to Signature Bank, you must file your claim form by this deadline.

If I'm mistaken, I'd love for the FDIC to correct me on the record. But there's nothing of the sort because the FDIC, I don't think, ever took the position that a securities class action was subsumed.

In the *Levin vs. Miller* case, actually the Court noted that there the FDIC took the position that direct claims were not subsumed FIRREA and were not included. And so all of a sudden this is a reversal in the FDIC's position.

There are currently claims which our adversaries on lead plaintiff motion are involved with against First Republic

Bank, which our firm is involved with as well, as well as *SCV*, and the FDIC has not taken this position that they somehow have the right to all securities class action claims. And so we have an unprecedented power grab in our view by the FDIC.

In no way do we think it should be ruled upon on this record.

We think it needs to be ruled upon on a record where we have a lead plaintiff appointed pursuant to PSLRA who can file an amended complaint and only then could the Court determine whether the claims in that amended complaint are impacted by the -- by FERREA and its dictates.

THE COURT: Notwithstanding the fact that we still have the individual defense in this case?

MR. LIEBERMAN: Yes.

THE COURT: And I'm certainly not advocating for a stay. Because if the Court doesn't have jurisdiction, we can impose a stay theoretically.

In light of their view that these claims need to be exhausted, would you consider a stay until those claims have been exhausted?

MR. LIEBERMAN: No, Your Honor. Because this is the first, you know, case in our view in the history of FERREA where we've heard that a securities fraud class action somehow needs to be exhausted through the administrative remedies of the FDIC. There is nothing in the notice that told investors

if you're an investor, particularly a former investor -- he essentially talks about a stockholder, doesn't talk about former shareholders, because if you represent a significant amount of former shareholders -- and nothing in the notice said if you're a former shareholder or current shareholder and you have individual claims or you have claims against the individual defendants, in order to -- you need to now make your claim right now in this administrative process, and there is nothing in the notice.

The FDIC talked about duty investigation and perhaps bringing claims, they haven't said any -- they have any intent to bring securities fraud class action claims on behalf of former shareholders because it would be the first time in the history of the FDIC that ever occurred.

So all the case law, Your Honor, and all the statutory provisions, and the FDIC's own actions, point to the fact that it has no interest in these claims, has no real intent to pursue these claims on behalf of the class, yet somehow wants to usurp them for its own benefit.

THE COURT: In light of the FDIC's position, are those claims ever going to be exhausted then? Or do you think those claims won't be pursued necessarily from your clients?

MR. LIEBERMAN: Your Honor, I have -- I have no confidence. And I have, based on precedent and the FDIC's past actions in every other bankruptcy receivership, this

would be the first time ever that the FDIC would pursue on behalf of current and former shareholders a securities fraud class action against the -- against the individual defendants or potentially against even the bank. It's never happened before. So I don't think the FDIC has any plans to do so. And we haven't heard the FDIC say they had plans to do so even in this hearing.

THE COURT: Okay. Understood.

Ms. Gilmore, let me turn to you. I've reviewed the motion papers. Anything you want to highlight for the Court other than what's already in the papers?

MS. GILMORE: For the lead plaintiff?

THE COURT: Yeah.

MS. GILMORE: (Indiscernible), I just want to make a few points.

THE COURT: Sure. Go ahead.

MS. GILMORE: It is AP7's burden here to establish standing, which they have not satisfied by any means. Their third-party exception to the U.S. Constitutional standing is very narrow. We cite EDNY --

THE COURT: Ms. Gilmore, why don't you pull the microphone closer to you.

MS. GILMORE: I'm sorry.

THE COURT: I've heard enough from Mr. Lieberman, so you can pull the microphone closer to you.

MR. GILMORE: Fair Enough.

The Supreme Court has made it clear that it does not look favorably upon third-party standing except in certain circumstances. We cite *Green vs. Garber*, EDNY 2017, quoting *Kowalski vs. Tesla*, which is a Supreme Court case from 2004.

Huff, Your Honor, which is a Second Circuit binding opinion, rejected the assertion of a prudential exception based on investment manager standing because the investment advisor client relationship is not the type of close relationship courts have recognized as creating a prudential exception to the third-party standing rules.

The risk that AP7 here is later found to lack standing at class certification on summary judgment or on appeal is particularly troubling here because standing issues, as the counsel for AP7 has argued in other cases, may be raised by a party or by a court at any time, at each stage of the litigation, even after trial and after entry of the judgment. And this is a quote from *Carter vs HealthPort*, 822 F.3d. 47, page 56, Second Circuit 2016.

So the failure here by AP7 to demonstrate standing is very serious and severely prejudices a class by exposing absent class members to statute of limitation and statute of repose concerns.

AP7 in this case has presented zero evidence that it has satisfied the very narrow prudential exception to the U.S.

Constitutional standing requirement.

The only purported, and I can't even call it evidence, it offers is a self-serving statement by AP7's CEO which is made in a footnote to his declaration. And I think that it's at docket number 61, footnote 1, that is certainly not sufficient under *Huff* to establish standing.

In fact, the declaration that AP7's counsel has submitted after (indiscernible) to show that it is entitled to the very narrow standing exception in *Green Mountain* demonstrates that it probably doesn't have standing here.

And I wanted to quote from the declaration. It says the lawyers there who purportedly think -- say that they were -- their lawyers, who are knowledgeable in Swedish law, say AP7 is acting -- I'm sorry, this is -- Swedish law concerning the funds and AP7 in this respect is inspired by the common law trust and trustee concept. But importantly, in that case, the experts hedge their statements by stating it's just their view and that certain concepts of the Investment Funds Act of the Swedish law were to be reflected, not that they are reflected, but they were to be reflected in the regime.

And they state, however, as we do not hold ourselves to be familiar with all aspects of the trust and trustee concept, we express no opinion on what, if any, current features of the Investment Funds Act regime correspond to that concept.

So in this case, the only evidence again that AP7's counsel purports to have to establish a relationship akin to a trust or trustee one is AP7's CEO own self-serving declaration.

That CEO is not a lawyer, let alone a lawyer that is an expert on trust or on trustee law, so we don't think that declaration has much weight here.

There is also -- there were also important allegations that have been made recently in the *Goldman* litigation against *AP7*, who has been alleged to have been engaged in the discovery misconduct which subjects AP7 to any defenses, and I wanted to give Your Honor just a few examples.

So defendants in *Goldman* objected to AP7's ability to lead a class of investors because AP7 was said to engage in conduct casting doubt on AP7's credibility and adequacy to serve as a class representative.

This objection was made in the class certification context after defendants extracted testimony from AP7's CEO who confessed that AP7 has actively and intentionally deleted highly-relevant monthly transaction reports detailing the security trades and other investment transactions undertaken on behalf of AP7 even though the asset manager knew that it had an affirmative obligation to preserve all those relevant documents.

Defendants emphasized in that case that the

destruction of such critical transactions is particularly troubling considering that over the 40-year class period AP7 was serving as lead plaintiff in at least seven other U.S. Security class actions and was thus obligated to preserve the documents including these monthly reports.

Importantly, these monthly reports did not -- did not cover just securities in the *Goldman Sachs* case, but monthly reports about AP7's investments altogether.

When defendants asked AP7 to facilitate obtaining copies of deleted reports from third parties under AP7's supervision and control AP7 simply refused.

Defendants in the Goldman Sachs litigation suspected AP7 of shorting Goldman Sachs Securities given the CEO's testimony that AP7's investment strategies regularly involves short-selling of stocks.

Defendants in the *Goldman* case also learned that in the *Aucoin* litigation which is the line of -- which a few district courts relied on to find that AP7 had standing, that in that litigation AP7 moved to appointment as lead plaintiff but failed to disclose to the Court in that certification that AP7 had bet against its fellow class members during the class period shorting 60,100 shares of Aucoin common stock and making almost half a million dollars in profits.

Your Honor, a litigant like AP7 here is seeking to take advantage of the narrow standing requirements of the U.S.

Constitutional law should be expected and ought to comply with the discovery obligations of the U.S. Securities Laws.

AP7 is also atypical and subject to any defense, not only because of its discovery misconduct in the recent litigation, but also because as its CEO recently testified, it regularly engages in the short-selling of securities.

This strategy is not unique to AP7 investments in Goldman Securities and applies across the board of all of AP7 investments.

In the recent *Kraft Heinz* litigation, moreover, defendants alerted the district court that while plaintiffs had represented that AP7 trades in the company were done solely to mimic various indexes, discovery has revealed that it's not the full picture and that the investment manager set up (indiscernible) indices in which they bought or sold stock on AP7's behalf. And that despite the suggestion that AP7's trading merely tracked existing indices in a way that involved no discretion, that turned out to be false.

Whether or not AP7 can ultimately defeat this argument is irrelevant at this stage.

Whether there is a list of potential that are presumptively most adequate, lead plaintiff will be subject to these unique defenses, disqualification is appropriate.

Your Honor, we believe there is no reason here to prejudice the class when you have Wayne County and Mississippi

standing ready to represent the class in an efficient way, and they are not handicapped by those unique defenses.

THE COURT: All right. Thank you, Ms. Gilmore.

Let me hear from AP7 on the two issues, the first one being the subject matter of question, and then the motion itself.

All right. Go ahead.

MR. AMJED: Good morning, Your Honor.

THE COURT: Good morning.

MR. AMJED: In terms of the FDIC's subject matter, that's the question?

THE COURT: Yeah.

MR. AMJED: We agree with the comments made by Mr. Lieberman and the need to have a lead plaintiff appointed here.

The FDIC's entire argument, as confirmed today, is based on the allegations of initial complaints filed by people that have diminished financial interest, and I don't even believe the plaintiff in this case, as counsel represented, is represented by counsel here.

The lead plaintiff process under the PSLRA is entitled to give the class a court-selected leader who can make the decisions that the Court is questioning us about, whether there's a stay that's necessary, what claims to pursue, will we -- will the FDIC's upcoming motion to

intervene be accepted, all those decisions right now are being made by a group of parties and a group of plaintiffs that are not -- that have not been appointed lead plaintiff.

So the need to have the case organized under a lead plaintiff who can make these decisions is consistent with the PSLRA and Second Circuit authority in (indiscernible) which empowers one lead plaintiff to make decisions for the class as a whole. Right now it's a complete free-for-all.

We understand the FDIC has conferred with certain colleagues. They haven't conferred with us. The plaintiffs are basically making their own positions. And there's no uniformity in the decisions that the -- that are being made on behalf of the class.

The Court asked the FDIC about the prejudice that they would face and my counsel represented that there wasn't much.

On the flip-side to that, Your Honor, there's significant prejudice to investors by having this sort of free-fall approach, where they don't have a unified voice and they don't have their claims being put forth in a pleading that's being directed by a lead plaintiff who's making decisions about who to sue, what claims to bring, what class period to pursue. All of those are within the jurisdiction of a lead plaintiff.

In terms of whether or not the Court can even hear

the claims, the *First Millennium* opinion that my colleague cited is right on point.

And the Second Circuit has clearly said once the -- once there are no claims against the FDIC or the depository bank, then the jurisdictional or other procedural limits of FIRREA drop out of the picture.

In terms of, you know, whether or not the claims are direct or derivative, again, the Pomerantz firm articulated that the relevant case law in *Levin*, which makes the distinction between what claims are direct what claims are derivative, and direct claims under Section 10(b) are within -- are investors' claims to pursue.

There's the Fourth Circuit case in *Howard*. And there's also the Third Circuit case in *Hayes vs. Gross* which we cite in our letter in opposition to the FDIC, which made clear that claims under 10(b)(5), which are the -- which are the claims being asserted in this case, are direct claims that can be litigated by investors and do not get usurped by the FDIC.

So not only is there no jurisdictional basis for the FDIC to come in and say we want to take over this case, but the PSLRA requires the Court to appoint a lead plaintiff so that these decisions can be made by a court-sanctioned authority.

THE COURT: Okay. Understood.

Do you guys want to be heard on your motion for appointment of lead counsel for plaintiff or do you want to rest on your papers?

MR. AMJED: Yes. Yes, Your Honor.

THE COURT: Go ahead.

MR. AMJED: Your Honor, AP7 is entitled to appointment under the PSLRA, has the largest loss, is adequate and typical. It has a decade of experience as a lead plaintiff. It's been appointed 13 times by district courts across the country, including four by the Southern District of New York. It's 11 for 11 in defeating motions to dismiss where a court has decided the motion. It's been certified as a class representative six times. And eight times it settled cases for more than a billion dollars.

The process for appointing AP7 should be straightforward. It's presumptive status under the statute cannot be easily cast aside by speculation and conjecture, which is the only thing that Wayne and Mississippi are offering.

In terms of standing, AP7 standing is a matter of -- it's settled. As my colleague pointed out, there's evidence in the record, which is the only evidence before the Court, establishing that AP7 meets the well-recognized prudential exception as articulated by *Huff*.

AP7 is obligated by law to protect the equity fund.

The equity fund is a pool of assets that has no ability to act on its own. And if AP7 can't protect the fund than no one can.

This is precisely the two prongs of *Huff* that courts have looked at throughout the country to appoint AP7 as lead plaintiff.

In addition to the evidence before the Court, there's five district courts that have independently looked at AP7's standing and rejected the very argument that counsel is making here.

The most recent opinion in *Coinbase* appointed AP7 as the sole lead plaintiff. It's a 2022 opinion from the District of New Jersey, where the Court analyzed standing under Huff, confirmed the close relationship between AP7 and the equity fund, and confirmed the fund's inability to bring suit in its own name.

The Court there dismissed standing arguments as speculation that falls well short of the proof required by the PSLRA.

Coinbase's reasoning accords with four other federal courts that have analyzed this issue.

In 2014 the *Aucoin* court appointed AP7 as the sole lead plaintiff after analyzing *Huff*, it's standing, and the relationship between the equity fund.

In 2018, Judge Furman from the Southern District of

New York appointed AP7 as the sole lead plaintiff in *G.E.* And before even entertaining oral arguments said I do conclude that the prudential exception applies to AP7, standing is not an issue.

In 2019, Judge Broderick from the Southern District appointed AP7 as the sole lead plaintiff in *Goldman* and joined Judge Furman's analysis in *G.E.*

My colleagues on the other side of the table know the analysis in *Goldman* very well because many of the arguments they're making before you they made before Judge Broderick which she rejected.

One of those arguments they made is that AP7 should have gotten an assignment of claims to pursue litigation.

Based on the briefing in *Goldman* and based on Judge Broderick's acceptance of the prudential exception, they know the equity fund can't act. They know they have no factual basis to make the claim, but they made it anyway before this court.

In addition to those opinions, in 2020, Judge Liman in the Southern District appointed AP7 as lead plaintiff in the *Luckin* case and rejected standing arguments.

Aucoin, *Luckin*, *Goldman* and *Coinbase* specifically considered the one case to go the other way, which is *Pipefitters*. The *Pipefitters* is a 2011 opinion from Judge Pauley which did not address the issue. He never engaged in

whether or not AP7 had standing. He simply side-stepped it and said I think there's a concern based on no evidence and he rejected AP7.

That's not what the statute allows.

The statute specifically says if you want to reject AP7 and unseat it as the presumptive lead plaintiff, you need to present proof of inadequacy. You can't just say I think there's a concern and, therefore, AP7's status is rejected.

Not only do the cases that specifically address AP7's standing reject Judge Pauley's analysis, but there's a another opinion from the District of Delaware called (indiscernible) where Judge Andrews looked at Judge Pauley's prior opinion in *Baydale*, you which is the precursor to *Pipefitters*, and said *Baydale* doesn't follow the approach because Judge Pauley doesn't engage in the issue. He just side-stepped the matter and, therefore, I reject *Baydale*'s analysis.

Not only do the movants' arguments -- not only are they not support by law, they're not supported by any fact.

Luckin and *Goldman* both made the observation that despite all of the concerns that competing movants have against AP7's standing, they haven't identified a single case where AP7 was rejected as a lead plaintiff. And this continues to be the matter.

As I said in my opening, AP7 has been serving in

many cases and has been certified as a lead plaintiff -- has been certified as a class representative six times, and in no case has defendant successfully rejected AP7's standing or even raised the argument.

A couple of cases that, you know, my colleagues have put in their briefing that are worth mentioning, aside from *Pipefitters*, *Paysafe*, *AT&T*, and *Array*.

Paysafe I know very well. That's a case I argued.

There the issue wasn't that the movant couldn't necessarily establish standing. The issue was that the movant's entire financial interest was based on more than a hundred assignments from individuals. And there was not a clear statement in that -- in those assignments that they were not revocable.

So in order to even answer that question, the movant would have to do a 100-person survey to answer that -- to answer that question. Therefore, the Court rejected that movant as a suitable lead plaintiff.

In *Gross vs. AT&T* and in *Array*, they both dealt with assignment based standing. Again, we don't have that issue because the equity fund cannot act. It has no employees. It has no legal personality to act.

Gross and *Array* were both specifically considered by the *Coinbase* court and rejected as being distinguishable from AP7's situation.

An interesting note about the -- about the *Array* decision. It's a 2021 opinion from Judge Marrero where he rejected an Austrian manager based on assignment. But a year later, in *Bricklayer vs. New Oriental,* Judge Marrero appointed as the sole lead plaintiff a German manager who claimed standing under *Huff*'s prudential exception. Because like AP7, he's the only party able to act to protect its funds.

Another 2022 opinion from the Northern District of Illinois, *DocuSign*, noted that courts routinely appoint -- routinely recognize the exception articulated in *Huff* when faced with facts that are similar to the ones before the Court there, which is a movant with a close relationship and the fund unable to protect itself.

In a slight twist from the arguments they've raised in other cases, my colleague argued that, well, AP7 is not -- is not a trust, and they -- the materials they put in don't clearly say that it is -- it is a trust.

And I'm guessing that they're saying that because *Huff* provides examples of where prudential exception is triggered. But *Huff* is a test. It's not a list. And the two prongs of *Huff* are do you have a close relationship and is there a barrier?

And the examples that *Huff* provides are just illustrative of that.

For example, *Huff* does not say that biological

parents have the ability to represent their minor children, but they clearly do. And the citation that *Huff* uses is a partial quote from the Second Circuit opinion in *Sprint* that talks about trustees, administrators, and the quote ends, "And so forth," meaning this is not an all encompassing list. This is examples of situations where the prudential exception applies.

And all of the courts considering AP7's standing, and all of the courts considering other European manager standing under *Huff*, apply its test, not the list.

On the discovery point, Your Honor, the fact that defendants made some arguments in *Goldman Sachs* and *AP7* is violating its discovery obligations.

Number one, I think the fact that *AP7* is in discovery completely undercuts the point that *AP7* doesn't have standing.

Number two, I reject the notion that AP7 doesn't take it's discovery obligations faithfully.

It's been a fiduciary for over a decade. And the actual facts there are different than what defendants represented.

The actual facts there were that AP7 did not retain records before a litigation hold was implemented and they were destroyed pursuant to its regular document retention policies.

Moreover, the *Coinbase* considered this exact

argument, based on the exact case law, based on the exact case, and rejected it as conjecture.

Moreover, after the defendants raised their argument in *Goldman Sachs*, AP7 was certified as a class representative in the (indiscernible) case in 2023.

So the fact -- the arguments based on what defendants say, Your Honor, has no basis in fact and is completely inappropriate under the PSLRA to reject AP7.

The shorting argument is complete speculation. AP7 did not short *Signature*. I don't even understand how a reference from another case could be implicated here.

And, moreover, in the *Aucoin* case where AP7 did short, the Court did certify AP7 as the class representative. So clearly it was not an issue for AP7 there.

Subject to any other questions Your Honor has, I think that's the totality of my argument on AP7's standing.

THE COURT: All right. Thank you, Mr. Amjed.

Mr. Kane, I'll give you the last word. You've heard everything the movants have said so far. Anything else you want to add on your end?

MR. KANE: Thank you again, Your Honor.

Just a couple of points. One to just clarify the prejudice point. I was really focused on the financial prejudice to the potential depletion of the D&O policies.

As for more broadly, there certainly would be

prejudice to the FDIC by allowing plaintiffs to circumvent the receivership process and the claim submission process that all other claimants need to go through.

And there also would be prejudice to the extent the FDIC is correct that these are the FDIC as receiver's claims to have other counsel and other plaintiffs attempt to assert them.

So there is inherent prejudice. I just wanted to clarify. I was really focused on the D&O policies when I -- when I answered that question.

With respect to the prejudice to plaintiffs, I heard their main argument being that there could be a potential free-for-all, there wouldn't be coordination.

I believe based on the letters they submitted in response to my letter they do seem to be able to coordinate efforts and respond. If you look at both letters they basically are making the same arguments. And today they've also been able to coordinate and respond to my points I made to you in court today.

And lastly, I think the bottom line issue above and beyond who has more prejudice is really does the Court have subject matter jurisdiction?

And I'll reiterate the FDIC's position is that the issues of subject matter jurisdiction should be a threshold issue that should be decided by the Court in the first

instance.

Again, I thank Your Honor for inviting me today and allowing me to speak.

THE COURT: All right. Understood.

The Court is mindful of the statutory deadline, so I'll take the motions under advisement. Thank you, everyone. We are adjourned.

ALL COUNSEL: Thank you.

(Proceedings adjourned at 10:01 a.m.)

I, CHRISTINE FIORE, court-approved transcriber and certified electronic reporter and transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Christine Fiore

______________________________ August 6, 2023

Christine Fiore, CERT

Transcriber